

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ERVIN MIDDLETON,

Plaintiff,

v.

CARRINGTON MORTGAGE SERVICES,
LLC, et al.,

Defendants.

Case No. 2:15-cv-01977-APG-PAL

ORDER
– AND –
**REPORT OF FINDINGS AND
RECOMMENDATION**

(IFP App. – ECF No. 1)

This matter is before the court on Plaintiff Ervin Middleton’s Application to Proceed *In Forma Pauperis* (ECF No. 1). This Application is referred to the undersigned pursuant to 28 U.S.C. § 636 (a)–(b) and Local Rules LR IB 1-3 and 1-4 of the Local Rules of Practice.

I. IN FORMA PAUPERIS APPLICATION

Mr. Middleton is proceeding in this action *pro se*, which means that he is not represented by an attorney. *See* LSR 2-1. Pursuant to 28 U.S.C. § 1915 and LSR 1-1 of the Local Rules of Practice, any person who is unable to prepay the fees in a civil case may apply to the Court for authority to proceed *in forma pauperis* (“IFP”), meaning without prepaying the full \$400 filing fee. Here, Mr. Middleton has requested authority to proceed IFP and submitted the affidavit required by § 1915(a) showing that he is unable to prepay fees and costs or give security for them. Accordingly, his request to proceed IFP will be granted. The court will now review the Complaint.

II. SCREENING THE COMPLAINT

After granting a litigant’s IFP request, a federal court must screen the complaint and any amended complaints filed prior to a responsive pleading pursuant to § 1915(e). *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (§ 1915(e) applies to “all in forma pauperis complaints”). The simplified pleading standard set forth in Rule 8(a) of the Federal Rules of Civil

1 Procedure¹ applies to all civil actions, with limited exceptions. *Alvarez v. Hill*, 518 F.3d 1152,
 2 1159 (9th Cir. 2008). For the purposes of § 1915's screening requirement, a properly pled
 3 complaint must therefore provide "a short and plain statement of the claim showing that the pleader
 4 is entitled to relief." *Cf.* Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 5 555 (2007). When a court dismisses a complaint under § 1915(e), the plaintiff should be given
 6 leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from
 7 the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v.*
 8 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

9 Allegations in a *pro se* complaint are held to less stringent standards than formal pleading
 10 drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Hebbe v. Pliler*, 627 F.3d 338,
 11 342 n.7 (9th Cir. 2010). However, *pro se* litigants "should not be treated more favorably than
 12 parties with attorneys of record," *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986); rather,
 13 they must follow the same rules of procedure that govern other litigants. *Ghazali v. Moran*, 46
 14 F.3d 52, 54 (9th Cir. 1995).

15 **A. Middleton's Factual Allegations and Claims for Relief**

16 This action involves a mortgage note and deed of trust for real property located in
 17 Spotsylvania, Virginia (the "Property"). *See* Compl. (ECF No. 1-2) at 3. Mr. Middleton alleges
 18 that the original borrower, "Matthew Ice," executed the loan in December 2008, and the Property
 19 was transferred to him on May 23, 2014. *Id.* Middleton assumed the borrower's rights and
 20 responsibilities after the Property's transfer because Defendant Carrington Mortgage Loan
 21 Servicing, LLC ("Carrington") failed to invoke the due on sale clause. *Id.* On March 20, 2015,
 22 Middleton sent Carrington a notice of rescission pursuant to 15 U.S.C. § 1635, which is a provision
 23 of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601–1667f. However, he alleges that
 24 Carrington has not complied with its statutory obligations as a lender. *Id.* at 4. In September 2015,
 25 Mr. Middleton recorded a Notice of Release of Mortgage under operation of law. *Id.* Carrington
 26 did not respond. *Id.* Middleton seeks a declaratory judgment that the mortgage note related to the
 27

28 ¹ All references to a "Rule" or the "Rules" in this Order refer to the Federal Rules of Civil Procedure.

1 Property is terminated, released, void, and invalid. *Id.* at 6. Additionally, he seeks restitution
2 based on Carrington's non-compliance with statutory requirements. *Id.* at 6–7.

3 For the reasons discussed below, the court finds that the complaint fails to allege personal
4 jurisdiction over Carrington, fails to state a claim upon which relief can be granted, and lacks
5 proper venue.

6 **B. Jurisdictional Defects**

7 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*,
8 437 U.S. 365, 374 (1978). A court's jurisdiction to resolve a case on its merits requires a showing
9 that the plaintiff has both subject matter and personal jurisdiction. *Ruhrgas AG v. Marathon Oil*
10 *Co.*, 526 U.S. 574, 577 (1999). "A federal court is presumed to lack jurisdiction in a particular
11 case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of the*
12 *Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

13 Personal jurisdiction gives a court jurisdiction over the *person or entity* against whom the
14 case is brought. Personal jurisdiction is based on principles of individual liberty and it represents
15 a restriction on judicial power. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456
16 U.S. 694, 702 (1982). Due process requires that a nonresident defendant have minimum contacts
17 with the forum state such that the exercise of personal jurisdiction does not offend traditional
18 notions of fair play and substantial justice. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945);
19 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 838 (9th Cir.1986). A defendant's
20 conduct and connection with the forum must be such that the defendant should reasonably
21 anticipate being haled into court there. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)
22 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

23 Here, the complaint fails to demonstrate that Carrington is subject to personal jurisdiction
24 in Nevada. The actions and inaction about which Middleton complains occurred either in
25 California or Virginia. He states that Carrington conducts business in Santa Ana, California. The
26 complaint alleges no facts to establish that Carrington's conduct and connections with Nevada are
27 such that it would anticipate being sued in Nevada. Mr. Middleton has not established that this
28 court has personal jurisdiction over Carrington. Although Mr. Middleton may be able to amend

1 his complaint to plead personal jurisdiction over Carrington in Nevada, leave to amend will not be
2 granted because he cannot cure the other defects in his complaint noted in this order.

3 **C. Venue for Middleton’s Claims is Not Proper in the District of Nevada**

4 In addition to a lack of personal jurisdiction, the court finds that venue is not proper in the
5 District of Nevada. The federal venue statute requires that a civil action be brought in (1) a judicial
6 district in which any defendant resides, if all defendants reside in the same state where the district
7 is located; (2) a judicial district in which a substantial part of the events or omissions giving rise
8 to the claim occurred, or a substantial part of property that is the subject of the action is situated;
9 or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the
10 action is commenced, if there is no district in which the action may otherwise be brought. 28 U.S.C.
11 § 1391(b). Pursuant to 28 U.S.C. § 1406(a), the court may dismiss an action laying venue in the
12 wrong district.

13 The complaint plainly demonstrates that the District of Nevada is not a proper venue for
14 this lawsuit. Although the complaint states that Middleton is a Nevada resident, it acknowledges
15 that Carrington is based in Santa Ana, California. Additionally, the Property is located in Virginia,
16 not within the District of Nevada. As such, the District of Nevada is not a proper venue for this
17 case even if Mr. Middleton could establish personal jurisdiction, which he has not.

18 **D. Mr. Middleton’s Allegations Fail to State a Colorable Claim Under TILA**

19 Federal courts are required to dismiss an *in forma pauperis* action if the complaint fails to
20 state a claim upon which relief may be granted, is legally “frivolous or malicious,” or seeks
21 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). The
22 standard for determining whether a plaintiff has failed to state a claim upon which relief can be
23 granted under § 1915 is the same as the Rule 12(b)(6) standard for failure to state a claim. *Watison*
24 *v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule 12(b)(6) is essentially a ruling
25 on a question of law. *N. Star Intern. v. Ariz. Corp. Comm’n*, 720 F.2d 578, 580 (9th Cir. 1983).
26 Although detailed factual allegations are not required, Rule 8 demands “more than labels and
27 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*,
28 556 U.S. 662, 678 (2009). Mere recitals of the elements of a cause of action supported only by

1 conclusory allegations do not suffice. *Id.* at 679–80. Where the claims in the complaint have not
2 crossed the line from plausible to conceivable, the complaint should be dismissed. *Twombly*, 550
3 U.S. at 570. Stated differently, the factual allegations “must plausibly suggest an entitlement to
4 relief, such that it is not unfair to require the opposing party to be subjected to the expense of
5 discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

6 Mr. Middleton lacks standing to bring this lawsuit. To have standing to bring a claim under
7 TILA, a plaintiff must have been deprived of a statutory right to disclosures that existed at the time
8 of the contested transaction. *See Crevier v. Welfare & Pension Fund for Local 701 (In re Crevier)*,
9 820 F.2d 1553, 1555–56 (9th Cir. 1987). Thus, if a plaintiff was not the borrower, he does not
10 have standing to assert a TILA claim. *See* 12 C.F.R. § 226.1 (among other conditions, TILA
11 applies to lenders when “credit is offered or extended to consumers”). The Ninth Circuit has
12 recognized that a plaintiff without standing fails to state a cognizable TILA claim. *In re Crevier*,
13 820 F.2d at 1555. Here, the complaint alleges that “Matthew Ice” is the borrower who executed
14 the loan in December 2008. The complaint does not allege that Carrington extended a credit offer
15 to Mr. Middleton. Because Middleton was not the original borrower, he does not have standing to
16 assert a TILA claim.

17 Even if a successor-in-interest, trustee, or heir did have standing to bring a TILA claim,
18 rescission is unavailable after the property has been sold or transferred. *Takushi v. BAC Home*
19 *Loans Servicing, LP*, 814 F. Supp. 2d 1073, 1079–80 (D. Haw. 2011) (citing 15 U.S.C. § 1635(f)
20 (“An obligor’s right of rescission shall expire three years after the date of consummation of the
21 transaction or upon the sale of the property, whichever occurs first”); 12 C.F.R. § 226.23(a)(3)
22 (“If the required notice or material disclosures are not delivered, *the right to rescind shall expire*
23 *3 years after consummation, upon transfer of all of the consumer’s interest in the property, or*
24 *upon sale of the property, whichever occurs first.*” (emphasis added)). *See also Meyer v.*
25 *Ameriquet Mortg. Co.*, 342 F.3d 899, 903 (9th Cir. 2003) (“The regulation is clear: the right to
26 rescind ends with the sale.”) (citing 12 C.F.R. § 226.23(a)(3)). Mr. Middleton asserts that he
27 assumed Mr. Ice’s rights when the Property was transferred to him. Assuming this allegation is
28 true, Mr. Ice’s right of rescission expired upon that transfer.

